1956

Dr. R. B. Lindsay v. Jennie Woodward : Brief of Respondent

Utah Supreme Court

Harold G. Christensen; John H. Snow; Attorneys for Respondent;

IN THE SUPREME COURT

of the

STATE OF UTAH

DR. R. B. LINDSAY,
Plaintiff and Respondent,

—vs.—

JENNIE WOODWARD,
Defendant and Appellant.

Case No. 8492

RESPONDENT'S BRIEF

HAROLD G. CHRISTENSEN
JOHN H. SNOW
Attorneys for Respondent

TABLE OF CONTENTS

CASES CITED

TABLE OF CONTENTS

AUTHORITIES CITED

IN THE SUPREME COURT

of the

STATE OF UTAH

DR. R. B. LINDSAY,
Plaintiff and Respondent,

—vs.—

JENNIE WOODWARD,
Defendant and Appellant.

Case No. 8492

BRIEF OF RESPONDENT

This is an appeal by Jennie Woodward from a Summary Judgment entered against her by the Third District Court of Salt Lake County, dismissing her Amended Counterclaim to the Complaint of Dr. R. B. Lindsay, who brought suit against her to recover the reasonable value of medical services. The appeal evolved from these facts:

STATEMENT OF FACTS

On June 8, 1952, Jennie Woodward, defendant and appellant, herein referred to as defendant, was injured

in an automobile accident at Cokeville, Wyoming. Defendant's sister telephoned plaintiff and respondent, Dr. R. B. Lindsay, herein referred to as plaintiff, at Montpelier, Idaho, to secure medical treatment for defendant.

Plaintiff immediately drove to Cokeville, a distance of some 32 miles and examined defendant, whereupon defendant was taken to the Bear Lake Memorial Hospital in Montpelier.

Defendant was attended by plaintiff during her hospitalization, which lasted approximately one month (Deposition, p. 32). On July 29, 1952, a brace applied by plaintiff was removed. This was the last time defendant was treated by plaintiff (Deposition, p. 43).

In August of 1952, defendant consulted an attorney to represent her in asserting a claim for personal injuries against the driver of the other automobile involved in the accident (Deposition, p. 62). Later defendant filed suit in Wyoming.

By her Amended Petition in the Wyoming suit filed May 29, 1953, defendant sought recovery of $27,405.31 as damages for the following injuries: fracture of left clavicle; fracture of fourth, fifth, and sixth ribs, left side; fracture of seventh and eight vertebra; severe trauma and spraining of the pelvis articulation and junctions; severe trauma of the thoracic visera and severe traumatic pleurisy; arthritis of left shoulder and arm, right shoulder and neck, lower back and both legs, and pain and shock (R. 17, 19).

It was alleged that these injuries were permanent (R. 17). Defendant also sought certain special damages, including amount of plaintiff's bill for professional services, that of Dr. Paul, Salt Lake City, that of Dr. H. K. Rock, Kemmerer, Wyoming, and including travel expense to Salt Lake City, Utah, for an examination by Dr. L. N. Ossman (R. 21).

On August 27, 1954, the Wyoming suit was settled. Defendant executed a release of all claims and judgment of dismissal with prejudice and on the merits was entered by the Court pursuant to stipulation (R. 22).

On August 17, 1955, plaintiff filed the instant suit against defendant to recover $225.00, for medical services rendered (R. 1). This suit was filed in the City Court of Salt Lake City, Salt Lake County, Utah, defendant having by this time taken up residence in Salt Lake City. Defendant made no appearance in this case and judgment by default was entered on September 7, 1955 for the relief demanded in the complaint (R. 2).

Defendant filed notice of appeal on October 1, 1955, and after the appeal was taken and the cause transferred to the District Court of Salt Lake County, and as a part of the appellate proceedings, defendant filed a counterclaim seeking recovery of damages in the amount of $40,000.00 for alleged malpractice (R. 4, 5).

Plaintiff moved to dismiss this counterclaim upon the ground, among others, that the relief demanded ex-

ceeded the jurisdiction of the City Court and hence exceeded the appellate jurisdiction of the District Court (R. 6).

This motion was denied on December 5, 1955, and on December 19, 1955, plaintiff filed a Motion for Summary Judgment with attached Affidavit, setting up the release and the applicable statute of limitations. In order to protect the record, plaintiff also included the ground of excess of jurisdiction, plaintiff feeling that it was necessary under Utah decisions to assert this defense at every stage of the proceedings. This latter ground was not argued, however, it being explained to the Court by counsel for plaintiff that a ruling had previouusly been made upon this particular defense (R. 12, 22).

After argument, Judge Ray Van Cott, Jr. granted plaintiff's Motion for Summary Judgment (R. 23, 24). This appeal followed.

STATEMENT OF POINTS

POINT I.

THE CLAIM SET FORTH IN DEFENDANT'S AMENDED COUNTERCLAIM IS BARRED BY HER RELEASE AND THE JUDGMENT OF DISMISSAL IN THE WYOMING ACTION.

POINT II.

THE CLAIM SET FORTH IN DEFENDANT'S AMENDED COUNTERCLAIM IS BARRED BY LIMITATION.

POINT III.

THE DISTRICT COURT HAD NO JURISDICTION OVER DEFENDANT'S AMENDED COUNTERCLAIM BECAUSE THE COUNTERCLAIM EXCEEDED THE JURISDICTION OF THE CITY COURT OF SALT LAKE CITY, AND THEREFORE EXCEEDED THE JURISDICTION OF THE DISTRICT COURT ON APPEAL.

ARGUMENT

POINT I.

THE CLAIM SET FORTH IN DEFENDANT'S AMENDED COUNTERCLAIM IS BARRED BY HER RELEASE AND THE JUDGMENT OF DISMISSAL IN THE WYOMING ACTION.

The release executed by defendant in this case was apparently executed in Wyoming, and under general principles of Conflict of Laws, the effect of the release would be governed by the law of Wyoming, 76 C.J.S. 671 (Release, Sec. 39). Our research, however, has failed to reveal any Wyoming decisions applicable to the facts of this case. We, of necessity, therefore, have directed our research to decisions of other jurisdictions.

By the great weight of authority, a general release executed in favor of one responsible for the plaintiff's original injury, is a bar to an action against a physician for damages incurred by his negligent treatment of that injury. 40 A.L.R. (2d) 1075 (Release of One Responsible for Injury as Affecting Liability of Physician or Surgeon for Negligent Treatment of Injury).

A decision illustrating this well settled principle is *Thompson v. Fox,* 326 Pa. 209, 192 A. 107, 112 A.L.R. 550 (1937). In that case plaintiff was struck by an automobile on November 21, 1932, and as a result suffered injuries, the most serious of which was a fracture of the neck of the right femur. He was immediately attended by defendant, a practicing physician, and remained under his care until May 1933. In October, 1933, plaintiff brought suit against the driver to recover damages for injuries sustained as a result of the accident, including the fracture of the hip, which he alleged left him permanently lame and crippled.

On July 25, 1934, plaintiff settled the suit and released the responsible party ". . . of and from all, and all manner, of actions and causes of action . . . claims and demands whatsoever . . . " arising out of the accident. On March 4, 1935, plaintiff brought this suit, alleging that defendant carelessly and improperly treated the fracture and did not set it in accordance with surgical and medical standards. At the trial of this suit, the court directed a verdict for defendant. Plaintiff appealed. The Pennsylvania Supreme Court said:

> "There is apparently no case in this state directly in point, but the determining principles of law are as well established in Pennsylvania as elsewhere. Other jurisdictions have held, with almost complete unanimity, that there can be no recovery in such a suit against a physician for negligent aggravation of injuries, after a settlement effected with the tort-feasor who caused the accident. (Cases cited.)

"In the action against Taylor, plaintiff's recovery for the injury to his hip would have included the added damage caused by the alleged negligence of defendant. Doctors, being human, are apt occasionally to lapse from prescribed standards, and the likelihood of carelessness, lack of judgment or of skill, on the part of one employed to effect the cure of a condition caused by another's act, is therefore considered in law as an incident of the original injury, and if the injured party has used ordinary care in the selection of a physician or surgeon, any additional harm resulting from the latter's mistake or negligence is considered as one of the elements of the damages for which the original wrongdoer is liable. (Cases cited. Citing also Sec. 457 of the Restatement of the law of Torts.)

"Such being the law, for the final condition of his hip plaintiff could have sued, and did sue, Taylor; for the aggravation of the original condition plaintiff could have sued, and did sue, defendant. He could have pursued both actions to judgment. For the same injury, however, an injured party can have but one satisfaction and the receipt of such satisfaction, either as payment of a judgment recovered or consideration for a release executed by him, from a person liable for such injury, necessarily works a release of all others liable for the same injury and prevents any further proceedings against them (Cases cited.) This is true even though it was intended, or the release expressly stipulated that the other wrongdoers should not thereby be released. (Cases cited.) Nor is it material whether the tort-feasors involved committed a "joint tort of concurrent or successive torts, because the

> principle which underlies the rule is that the injured party is given a legal remedy only to obtain compensation for the damage done to him, and when that compensation has been received from any of the wrongdoers, his right to further remedy is at an end. Of course, if a tort-feasor is liable only for a part of the damage, and another tort-feasor is liable only for another part . . . a release of one does not release the other; but where both are liable for the same damage, nor matter upon what theory their respective liabilities are predicated, the rule applies. Since plaintiff, by settling with Taylor, was compensated for all injuries, both those originally and those ultimately arising out of the accident, including the aggravation of the hip condition by defendant's alleged negligence, he cannot obtain from defendant a second satisfaction for the same damage."

The judgment of the trial court was affirmed.

See also *Phillips v. Werndorff,* 215 Ia. 521, 243 N. W. 525 (1932) where the Supreme Court of Iowa observed:

> "The receipt was clearly designed to release the original wrongdoer from all and every claim of every kind against them. This necessarily included the aggravation of the original injury by the alleged unskillful and negligent treatment thereof by Appellee."

Other cases illustrating this rule are: *Benesh v. Garvais,* 221 Minn. 1, 20 N. W. (2d) 532 (1945): *Sams v. Curfman, et al* (Colorado, 1943) 137 P. (2d) 1017.

Additional cases are cited in the annotation previously referred to found at 40 A.L.R. (2d) 1075, and in

the Note at 39 N.C.C.A. 558, entitled, "Disease or Aggravation of Injury Due to Malpractice of Physician Attending Injured Person as Element of Damages Recoverable from Original Tort Feasor," and particularly Part II thereof entitled, "Settlement with Original Tort Feasor as Releasing Physician."

Defendant, apparently conceding that her appeal is without merit under the rule adopted by the majority of the courts, urges that this court apply the rule which defendant asserts is applied in California. Two California decisions are cited — *Ash v. Mortenson,* 24 Cal. (2d) 654, 150 P. (2d) 876 (1944) and *Dickow v. Cookingham* 123 Cal. App. (2d) 81, 266 P. (2d) 63 (1954).

The view taken in these cases is perhaps best illustrated by this excerpt from *Ash v. Mortenson*:

> "We are of the opinion that a release of the original wrongdoer should release an attending doctor from liability for aggravation of the injury if there has been full compensation for both injuries, but not otherwise."

While the facts in those cases may easily be distinguished from those of the instant case, the rationale of those decisions would appear to require inquiry into the extent of the claim asserted in the first suit as contrasted with that asserted in the subsequent suit. This, of course, is the only way it can be determined whether compensation was received for a particular injury. See *Wheat v. Carter,* 79 N.H. 150, 106 A. 602 (1919), cited by defendant.

Even if this approach be taken, however, the undisputed facts compel the conclusion reached by the trial court. Here defendant makes no claim which was not asserted by her in the previous suit, as appears from the following tabulation:

Present Action	Prior Action
". . . permanently injured in her health and constitution and suffered and continues to suffer great pain." (R. 10)	" . . . permanently injured. . . (R. 17) " . . . great and intense pain . . . " (R. 19)
" . . . permanent injury to her back . . . " (R. 10)	" . . . fracture of the body of the seventh and eighth vertebra . . . " (R. 17)
" . . . shoulder . . . " (R. 10)	" . . . left clavicle was fractured . . . " (R. 17)
" . . . legs . . . " (R. 10)	" . . . upper portion of both legs . . . " (R. 17)
" . . . body . . . (R. 10)	" . . . severe injury to said Mary Jane Woodward . . . " (R. 17)
" . . . hips . . . " (R. 10)	" . . . pelvis articulation and junctions . . . " (R. 17)
" . . . mind and entire nervous system . . . " (R. 10).	" . . . severe and profound shock to her nervous system . . . " (R. 19)
" . . . crippled . . . "(R. 10)	" . . . Arthritic conditions . . . " (R. 17)

In response to questions about her present complaints, defendant made these answers in her deposition:

"Q. Have you had these complaints which you have at this time since the accident?

"A. Yes.

* * *

"Q. In general, do you have the same complaints now that you had after the accident?

"A. Oh sure, only that the condition is—it isn't getting any better, see, it is just getting worse.

* * *

"Q. . . . And did you tell your attorney what injuries you had at that time?

"A. Yes, and the attorney knows because he has the medical reports from four doctors.

"Q. And did you tell him about the same complaints that you have told us about here today?

"A. Yes sure.

"Q. And he had talked to these four doctors you say?

"A. He has the medical reports from the four doctors.

"Q. And did he sue for those injuries which you have described here today?

"A. Yes.

"Q. And did you bring that suit against Mr. Olsen who was driving the other car?

"A. Yes.

"Q. And then you settled that law suit did you not?

"A. Yes.

(See deposition, pp 61-3)

The release executed by the defendant in settlement of that action provided as follows:

"FOR THE SOLE CONSIDERATION OF Fifty-seven Hundred fifty Dollars, the receipt and sufficiency whereof is hereby acknowledged the undersigned hereby releases and forever discharges L. K. Olson and State Farm Mutual Automobile Insurance Co., their heirs, executors, administrators, agents and assigns, and all other persons, firms or corporations liable, or who might be claimed to be liable, none of whom admit any liability to the undersigned but all expressly deny any liability from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, and particularly on account of all injuries, known and unknown, both to persons or property, which have resulted or may, in the future develop from an accident which occurred on or about the 8th day of June, 1952 at or near Cokeville, Wyoming.

"Undersigned hereby declares that the terms of this settlement have been completely read and are fully understood and voluntarily accepted for

the purpose of making a full and final compromise adjustment and settlement of any and all claims, disputed or otherwise, on account of the injuries and damages above mentioned.

"IN WITNESS WHEREOF, I have hereunto set my hand and seal this 27th day of August, 1954.

/s/ Mary Jane Woodward (SEAL)

In Presence of

/s/ E. J. Herschler"

(See copy between R. 21 and R. 22).

Even though the release specifically includes unknown injuries, defendant attempts to avoid the effect of this release by contending that she did not know until years after the settlement that her hip was injured (Brief, page 7). Defendant makes reference to page 48, line 10 of her deposition to support this assertion. The statement made on page 48 at line 10 is:

"And now I found out that this socket, this hip socket was knocked out (indicating), and that constant three and a half years' motion has worn that right thin."

On page 18 of her deposition, however, defendant testifies as follows:

"Q. Did you have any specific pains other than the one in your shoulder and the one in your back, on that occasion (the first afternoon or

evening following the accident), do you recall?

"A. Well, down through my hips, but as each day went on, see, they got worse.

"Q. You had pain in your hips?

"A. Yes and I still do."

Also, reference to hip injuries is made in the amended petition where complaint is made of injury to the pelvis articulation and junctions (R. 17).

Defendant also seeks to avoid the release upon the ground that "separate torts" where committed by the defendant (Brief, page 8). In her deposition, however, defendant complained only of the following against the plaintiff: alleged failure to take X-rays, failure to fix her fractured shoulder, failure to treat the injury to her pelvis, hips and back, and failure to build up her general physical condition (Deposition, pages 65-67). There is no assertion that the alleged conduct of the plaintiff did any more than aggravate an original injury.

Contrast the undisputed evidence in this case with the facts in *Mainfort v. Giannestras,* 49 Ohio Ops. 440, 111 D. E. (2d) 692 (1951), relied upon by defendant as authority for her "separate tort" theory. In that case plaintiff's leg was shortened 1½ inches as a result of an accident. Plaintiff executed a release of all claims. Thereafter plaintiff employed defendant to lengthen his leg. When the result of this operation was unsatisfactory, plaintiff sued for malpractice.

Defendant demurred on the ground that plaintiff had signed a general release.

Plaintiff contended the rule holding a release of the original wrongdoer discharges the physician applied only to negligence of physician occurring prior to the release. It was held, however, that the rule was not so limited.

Far from supporting defendant, the language from this case, quoted at page 8 of her brief, is fatal to her position when the facts of the case are considered.

Defendant also relies upon *Corbet v. Clark*, 187 Va. 222, 46 S. E. (2d) 327 (1948) to support this theory. Even a cursory examination of the facts there involved points up the very weakness of defendant's argument in this case. There one dentist left the root of a tooth in plaintiff's gum. A second dentist was alleged to have been negligent in extracting a different tooth and release of the first dentist was held not to discharge the second. It is obvious that the second dentist was not employed to treat plaintiff for injuries resulting from the negligence of the first and hence the question here involved and the rule generally recognized does not even come into operation.

Defendant also now claims that a separate tort was committed by plaintiff in "fraudulent misrepresentation and concealment" (Brief, page 9). At no time, however, is it explained how such could have in any way caused the damages of which defendant complains. The most

alleged is that plaintiff misrepresented the true condition of defendant and induced her to refrain from consulting other physicians, that she might learn the true condition proximately caused by the negligence and malpractice of plaintiff (R. 10). As a matter of fact, however, it is undisputed that defendant was examined by four medical doctors prior to settling her action (page 63). She has seen none additional since. (R. 21, Deposition, pp, 63, 71, 73), and she admits these doctors told her she had a permanent disability. (Dep. pp 50, 54).

By way of final attempt to avoid application of the almost universal rule previously stated, defendant suggests that her cause of action against plaintiff really is for breach of contract. Courts have long ago learned to perceive the difference between the form and the substance of an action. A similar argument was made and rejected in *Sams v. Curfmann, et al.,* (Colorado, 1943) 137 P. (2d) 1017. However designated, what defendant actually complains of in this case is alleged negligence upon the part of plaintiff.

Under this "contract" theory defendant refers to *Van Blumenthal v. Cassola et al.,* (Sup. Ct. of N. Y., 1938), 3 N.Y. Supp. (2d) 246, erroneously cited by defendant as *Bur v. Blumenthal* 2 N.Y. Supp. 246. While its holding is somewhat difficult to perceive, it appears contra to the decision of the N.Y. Court of Appeals in *Milks et al v. McIver et al.,* 264 N.Y. 267, 190 N. E. 487 (1936) In any event, defendant does not claim plaintiff contracted to produce a complete recovery from plain-

tiff's injuries, as in the Cassola case where the breach consisted in permitting the patient to die.

This Court's attention should perhaps be directed to the fact that defendant repeatedly refers to the allegations of her counterclaim as facts. Such is not the rule, however, on motions for summary judgment. *Schessler v. Keck,* (Calif., 1956) 292 P. (2d) 314.

In summary, whether the rule followed in the majority of jurisdictions be adopted, or the "minority rule", it is without dispute that defendant now complains against plaintiff for the same injuries she complained of in the prior suit, which suit was fully settled and satisfied. This settlement was made two years after all treatment by plaintiff had terminated — after she had consulted an attorney — after she had been examined by four doctors. And, significantly, only after judgment by default had been entered against her for the value of the services performed by plaintiff, was a counterclaim asserted.

POINT II.

THE CLAIM SET FORTH IN DEFENDANT'S AMENDED COUNTERCLAIM IS BARRED BY LIMITATION.

Section 78-12-45, Utah Code Annotated, 1953, provides:

> "When a cause of action has arisen in another state or territory, or in a foreign country, and by the laws thereof an action thereon cannot there

be maintained against a person by reason of the lapse of time, an action thereon shall not be maintained against him in this state, except in favor of one who has been a citizen of this state and who had held the cause of action from the time it accrued."

The claim which defendant now asserts in her Amended Counterclaim arose in the State of Idaho, since that is where Plaintiff's allegedly improper professional services were performed. The statutes of the State of Idaho provide that an action for personal injuries is barred unless the same is instituted within two years after the date the cause of action accrued (R. 15).

It is undisputed that no services of any kind were performed by plaintiff after July 29, 1952 (Deposition, p. 43). It is also undisputed that defendant was not a citizen of the State of Utah at the time this cause of action accrued (Dep. pp. 47, 48).

It would seem to follow, without citation of authority, that the cause of action set forth in the Amended Counterclaim of defendant is barred by limitation.

To escape this obvious conclusion, defendant claims that plaintiff concealed the true nature of her injuries and misrepresented her condition so that she did not discover the true facts until November, 1955. She apparently relies upon *Peteler v. Robinson,* 81 Utah 535, 17 P. (2d) 244 (1932).

In the Peteler case, however, it was specifically pointed out that the plaintiff was treated to and including October 22, 1926, long after the alleged negligent act occurred. The action was commenced January 24, 1927. In this case the full term of the statute of limitations ran between the date of the final treatment given defendant by plaintiff. There was no continuing negligence and concealment, as alleged in the Peteler case.

Nevertheless, it would seem material, in determining whether or not the action was barred in Idaho, to make examination of Idaho decisions. A decision strikingly to similar to this case is *Trimming v. Howard,* (Idaho, 1932) 16 P. (2d) 661. In that case the plaintiff sued for damages arising when he employed the defendant physician to treat him for spinal meningitis. Plaintiff alleged that defendant attempted to inject into his spinal column a certain serum by means of a hypodermic syringe, but that he broke off a portion of the needle in his back; that he failed in his contractual duty to skillfully and carefully treat the plaintiff and to remove the needle, and that the physician knowingly and falsely represented that the needle had been removed and that plaintiff did not discover the falsity of this representation until June 25, 1930. At the conclusion of the plaintiff's evidence a non-suit was entered on the ground that the action was barred by the statute of limitations.

The Supreme Court of Idaho said that the action was one arising out of a tort rather than contract and that the cause of action was nothing but malpractice,

which is negligence. The Court commented that the appropriate statute of limitations is determined by the substance, not the form of the action, and that as such the two year limitation period applies.

As to the claim of fraud, the court held that this was not in substance an action for fraud, and that since the wrong arose not from the fraud, but from the negligence, it could not be governed by the fraud statute of limitations. The Court observed that the cause of action arose on July 4, 1926, when the broken needle was left in plaintiff's back and since two years and eleven months had elapsed between the plaintiff's majority and the filing of his complaint, the action was barred by the two year limitation. The judgment of non-suit was affirmed.

This decision would seem to dispose also of the contention made that the statute of limitations applicable to fraud cases (Defendant's Brief, p. 11) or that applicable to contract cases (Brief, p. 12) is controlling.

The rather parenthetical contention that perhaps the law of Wyoming governs this case since the "contract" was made there, is contradicted by defendant's own Amended Counterclaim, wherein she stated that plaintiff, Dr. R. B. Lindsay, is and was at the time of said accident, a licensed and practicing physician in Montpelier, Idaho, and the defendant Mary Jane Woodward, employed the plaintiff Dr. R. B. Lindsay, as such on or about the 8th day of June, 1952, at *said place,* (Emphasis added).

POINT III.

THE DISTRICT COURT HAD NO JURISDICTION OVER DEFENDANT'S AMENDED COUNTERCLAIM BECAUSE THE COUNTERCLAIM EXCEEDED THE JURISDICTION OF THE CITY COURT OF SALT LAKE CITY, AND THEREFORE EXCEEDED THE JURISDICTION OF THE DISTRICT COURT ON APPEAL.

This defense was first raised by Motion to Dismiss, which Motion, after argument, was denied. No argument was made upon this point at the time of hearing the Motion for Summary Judgment, since, as was explained to the court, the matter had previously been submitted in a former hearing. This defense, however, was reasserted, since under the authority of *Burt & Carlquist Co. v. Marks, et al,* 53 Utah 77, 177 P. 224 (1918), this defense can be waived by failure to assert at each opportunity.

Plaintiff desires, therefore, to present briefly at this time the authorities in support of this contention. Plaintiff believes matters of jurisdiction over the subject matter of an action ought to be considered by appellate courts at all stages of the proceedings.

It will be recalled that defendant in the instant case appealed to the District Court after judgment had been entered against her by the City Court of Salt Lake City in the amount of $268.83, due for services rendered. After the appeal was filed, the counterclaim of $40,000.00 was asserted by defendant, although she had not even entered an appearance in the City Court case.

In *Hardy v. Meadows, et al,* 71 Utah 255, 264 P. 968 (1928), Hubbard, a doctor practicing in Carbon County, operated upon Meadows for appendicitis. Meadows shortly thereafter moved to Salt Lake City. In November, 1925, Meadows brought suit in the District Court in Carbon County against Dr. Hubbard for $5,750.00 damages for malpractice, which suit was later dismissed. An answer was filed in this case. In the meantime Hubbard assigned his claim for $125.00 for professional services to Hardy, who brought suit on April 1, 1926, in the City Court of Salt Lake City for $125.00. On April 21, Meadows appeared and obtained the order interpleading Dr. Hubbard. A counterclaim was thereupon filed against Dr. Hubbard for $5,750.00 damages. Hubbard filed a demurrer on the ground that the counterclaim was not pleadable as a counterclaim in the action and that the City Court did not have jurisdiction of the subject matter of the counterclaim nor of the cause of action therein alleged. This demurrer was overruled and Hubbard then answered denying negligence.

At the trial before the City Court judgment was rendered for Meadows for $874.99 against Hubbard. This judgment was appealed to the District Court of Salt Lake County.

When the case was set for trial before the District Court of Salt Lake County, Hubbard urged by motion that the City Court had no jurisdiction of the subject matter of the counterclaim and that therefore

the District Court did not acquire jurisdiction by the appeal, except to set aside the judgment of the City Court and to dismiss the action. The motion was overruled and the District Court proceeded to trial before a jury.

During the trial, but before submission of the cause, Meadows amended his counterclaim by striking the figures $5,750.00 and inserting in lieu thereof $1,000.00. The jury returned a verdict in favor of Hardy and against Meadows for $125.00 and in favor of Meadows and against Hubbard for $1,000.00. Judgment was then entered and this appeal taken.

Meadows contended on appeal that even though the City Court did not have jurisdiction of the subject matter of the counterclaim, the District Court, being a court of both appellate and original jurisdiction, had jurisdiction to try the issues to the full extent as set forth in the City Court.

Our Supreme Court observed the jurisdiction of the City Court to entertain the counterclaim was timely challenged by the demurrer and that in the District Court also such jurisdiction was again timely challenged.

The Court said:

> "The effect of the holdings in all of these cases is that the jurisdiction of the District Court of a cause on appeal from a justice's court, or from other inferior court is derivative and as is held in many other jurisdictions; that if the

inferior court had not jurisdiction of the cause and of the subject-matter therein presented, the district court acquired no jurisdiction thereof by appeal . . .

* * *

" * * * Whatever may be the rule elsewhere, the one declared by and to which this court is committed, that when the inferior court is without jurisdiction to hear and adjudicate the subject-matter of an action commenced therein, the district court to which the case is appealed does not acquire jurisdiction of the action though the district court would have original jurisdiction of such subject matter if by an original action such jurisdiction is invoked is a wholesome rule and one founded on basic principles.

"The conclusion thus reached by us is that since the City Court did not have jurisdiction of the subject matter presented by the counterclaim, the District Court, by appeal, did not acquire nor was it vested with jurisdiction to hear or try the counterclaim on merits, and the judgment rendered on the counterclaim by the City Court and the District Court are nullities and should be vacated."

The case was remanded to the District Court with directions that judgment be rendered in accordance with the decision.

The rule that a court of general jurisdiction has only the jurisdiction of the inferior court when a matter is heard on appeal dates back to the earliest reported

decisions in the western states. For example, see *Wagstaff v. Challiss* (Kansas, 1884) 1 P. 631.

This is the rule in Idaho. In *Albinola v. Horning, et al* (Idaho, 1924), 227 P. 1054, an action was begun in a justice's court to recover $288.00 due from defendant to plaintiff on account of a sale of stock. Defendant denied the allegations of the complaint, and upon trial, judgment went for the plaintiff; the defendant appealed to the District Court.

In the District Court, the defendant amended its answer and filed a cross-complaint, seeking $950.00 on account of a fraudulent conveyance of the stock, that sum being the amount paid plaintiff for the repurchase of the corporation's own stock. Plaintiff demurred to the cross-complaint and the demurrer was overruled. Upon motion of the defendant for judgment upon the pleadings, judgment was entered for the defendant and against the plaintiff in the amount of $1,141.05. The plaintiff appealed to the Supreme Court of Idaho, alleging that the District Court committed error in that it was without jurisdiction of the cross-complaint and that the judgment was in excess of the jurisdiction of the justice court.

The Court said:

> "In this state the jurisdiction of the district court on appeal from a justice court is purely derivative, and, if the justice had no jurisdiction in

> the purpose of expediting procedure and obviating trials where no genuine issue of fact exists." *Ulibarri v. Christenson* (Utah, 1954) 275 P. (2d) 170.

Under the undisputed facts appearing from the record in this case, defendant has fully settled and compromised the claim which she now asserts; this claim is barred by limitation; and the District Court is without jurisdiction to hear and determine it. This being so, the District Court properly granted plaintiff's Motion for Summary Judgment upon the issues raised by defendant's counterclaim. That judgment ought to be affirmed.

Respectfully submitted,

HAROLD G. CHRISTENSEN

JOHN H. SNOW

Attorneys for Plaintiff and Respondent.